92-1386

Supreme Court U.S.
FILED
JAN 12 1993
OFFICE OF THE CLERK

CASE NUMBER_____

SUPREME COURT OF THE UNITED STATES

October, 1992 Term

HAROLD F. YOUNGER

Petitioner

v.

DONNA E. YOUNGER

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

COUNSEL OF RECORD:

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January, 1993

QUESTION PRESENTED FOR REVIEW

Whether the United States Supreme Court should grant a writ of certiorari to consider whether the Court of Appeals improperly dismissed the appeal from an order directing the arrest of a U.S. citizen who had not committed a crime or an act of contempt.

LIST OF ALL PARTIES

The following constitutes a complete list of all parties of this case:

Harold F. Younger
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Post Office Box 9026
Savannah, Georgia 312412
Petitioner

Donna E. Younger
c/o John M. Tatum
Miller, Simpson & Tatum
P.O. Box 1567
Savannah, GA 31402

Donald Walton
U.S. Trustee
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Savannah, GA 31402

James L. Drake, Jr.
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Savannah, GA 31412
Chapter 7 Trustee

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

(Text in Appendix)

Order of U.S. District Court for the Southern District of Georgia (Judge John Nangle) dated June 16, 1992.

Opinion/Order of the U.S. Court of Appeals, Eleventh Circuit, dated October 14, 1992 dismissing appeal.

STATEMENT OF JURISDICTION

This court has jurisdiction to review this petition for a writ of certiorari under the provisions of 28 U.S.C. §1254, since the petition results from a decree of the United States Court of Appeals for the Eleventh Circuit entered on October 14, 1992 declining to entertain the Petitioner's appeal from an order of the United States District Court for the Southern District of Georgia entered on June 16, 1992 directing his arrest in a bankruptcy case.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CASE

1. U.S. CONSTITUTION, AMENDMENT 5

CRIMINAL ACTIONS-PROVISIONS CONCERNING-DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

[See appendix for full text of following:]

2. 28 U.S.C. §158(d)

3. 11 U.S.C. §101(13)

4. BANKRUPTCY RULES, RULE 2004

5. BANKRUPTCY RULES, RULE 2005

6. 28 U.S.C. §1334(a)

STATEMENT OF CASE

On March 27, 1992, Donna E. Younger (Respondent herein) filed an involuntary chapter 7 bankruptcy petition against her ex-husband, Harold F. Younger (Petitioner herein) in the United States Bankruptcy Court for the Southern District of Georgia as a means of enforcing the property division portion of a divorce decree. On April 15, 1992, the Respondent filed a Motion for service of the involuntary summons by publication and mail because the Bankruptcy Petitioner had been unable to find Mr. Younger for personal service. Also on April 15, 1992, the Respondent filed an ex parte Motion for examination of Harold F. Younger under Bankruptcy Rule 2004. The Bankruptcy Court granted that motion the same day.

The Bankruptcy Court's April 1 Order required Mr. Younger to appear in California for a deposition-type

examination at 2:00 p.m. on April 17, 1992, less than 48 hours after entry of the 2004 Order. The Bankruptcy Court file does not show that the clerk made any attempt to serve the April 15th Order and it was not served by the Respondent. Mr. Younger did not appear in California for the examination.

On April 28, 1992, the Respondent filed another ex parte Motion for examination of Mr. Younger pursuant to Bankruptcy Rule 2004. The Bankruptcy Court entered an Order at the same time requiring Mr. Younger to appear 3 days later for examination in Savannah on May 1, 1992 at 2:00 p.m. Again, the Bankruptcy Court file does not include a certificate showing any attempt to serve this 2004 order. It was not served by the Respondent. There is no evidence that the Respondent attempted to subpoena Mr. Younger.

On April 30, 1992, the Bankruptcy Court issued an order under Rule 2004 amending the April 28th order. The amended order required Mr. Younger to appear for examination in Savannah at 10:00 a.m. on May 5, 1992. Again, the Bankruptcy Court file does not include a certificate showing any attempt to serve the amended 2004 order. It was not served by the Respondent. There is no evidence that the Respondent attempted to subpoena Mr. Younger. Again, Mr. Younger did not appear for examination.

At the time each of the Rule 2004 Orders was entered by the Bankruptcy Court, Mr. Younger had not been made a party to the involuntary bankruptcy case by service of a summons. Finally, on May 21, the Bankruptcy Court concluded that service of the involuntary chapter 7 petition had been accomplished by publication and entered an Order adjudicating Mr. Younger an

involuntary bankrupt.

On June 11, 1992, the Respondent filed a Motion pursuant to Bankruptcy Rule 2005, asking that Mr. Younger be arrested and compelled to submit to an examination pursuant to Bankruptcy Rule 2004. The Bankruptcy Court declined to entertain the Motion. The United States District Court withdrew reference of the bankruptcy case for the limited purpose of dealing with the Rule 2005 Motion. The U.S. District Court exercised jurisdiction pursuant to 28 U.S.C. §1334(a).

On June 16, 1992, the District Court issued an order directing the U.S. Marshall to arrest Mr. Younger and bring him before the Court for examination. The District Court's docket does not reflect a hearing on the Motion and the order was presumably based solely on the affidavit of Donna E. Younger and any documents in the Bankruptcy Court file. In his appeal to the Eleventh

Circuit Court of Appeals, Mr. Younger asserted that the affidavit of Donna Younger did not include any facts which Rule 2005 requires as the basis for issuance of an ex parte arrest order.

Mr. Younger was arrested on June 25, 1992, in Jacksonville, Florida. He was subsequently jailed pending a Rule 2004 examination. At that examination, he properly invoked the 5th Amendment. He was re-jailed until the U.S. Attorney could arrange a grant of immunity. When he was granted immunity, Mr. Younger again declined to testify and was ordered jailed as a civil contemnor/recalcitrant witness. He remains incarcerated as of the date of this petition.

ARGUMENT AND CITATION OF AUTHORITY

Whether the United States Supreme Court should grant the writ of certiorari to consider whether the Court of Appeals improperly dismissed the appeal from an order directing the arrest of a U.S. citizen who had not committed a crime or an act of contempt.

By order issued on October 14, 1992, the United States Court of Appeals for the Eleventh Circuit dismissed the Petitioner's appeal. The Circuit Court held that the District Court's arrest order of June 16, 1992, was a nonappealable interlocutory order. The practical and legal consequences of the Circuit Court's order are unconscionable: A person like the Petitioner may be unlawfully arrested pursuant to Bankruptcy Rule 2005, without being accused of a crime or any act of contempt, and be barred from making an appellate challenge of his arrest.

Under the traditional definition, a final order is one which leaves nothing to be done except to enforce by execution what has been determined. Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945). A bankruptcy case, by its nature, does not necessarily lead to the entry of any order which is enforceable by execution. This fact has led appellate courts to conclude that a different standard of finality applies to orders which issue in a bankruptcy case. In re Lift & Equipment Service, Inc., 816 F.2d 1013 (5th Cir., 1987); In re Fox, 762 F.2d 54 (7th Cir., 1985); T&B Scottdale Contractors, Inc. v. U.S., 866 F.2d 1372 (11th Cir., 1989). In the bankruptcy context, an order is final which disposes of a discrete element of the bankruptcy case, leaving nothing but ministerial acts to be done pursuant to that order. Id.

Clearly the order mandating Mr.

Younger's arrest satisfies the bankruptcy standard of finality. The District Court's arrest order was final upon entry, to be fully executed by the ministerial act of Mr. Younger's arrest. While any number of issues remain to be adjudicated as part of Mr. Younger's bankruptcy, neither the Bankruptcy Court nor the District Court will necessarily enter another order in the bankruptcy case which will be more final for purposes of appellate review of the issues raised by the arrest order.

The Circuit Court's refusal to reach the merits of Mr. Younger's appeal would allow an egregious violation of Due Process to go uncorrected. Once an involuntary bankruptcy petition is filed, the prospective involuntary debtor is a "Debtor" subject to Bankruptcy Rule 2005, regardless of whether service of the involuntary petition has been accomplished. 11 U.S.C. §101(13). Any such person may be

ordered arrested under Bankruptcy Rule 2005. Under the Circuit Court's definition of finality, the arrested person may never have the opportunity to make an appellate challenge to the legality of an inadequate ex parte Rule 2005 affidavit upon which the arrest order is based.

As is illustrated by the facts of this case, Bankruptcy Rule 2005 confers an awesome, unique, and arguably unconstitutional power on the Bankruptcy Court. The court may order the prophylactic arrest and imprisonment of a person who may be subsequently adjudicated an involuntary bankrupt and whose testimony may be needed in the future in a bankruptcy case. The person to be arrested (as with Mr. Younger) need not have been accused of any crime or found to be in contempt of an order of court. He may be held indefinitely under a Rule 2005 order pending examination. As in Mr. Younger's

case, the arresting court may thereafter enter many additional interlocutory orders relating to the examination or incarceration of the Debtor. Any such order will be non-final and non-appealable. If the arrested Debtor immediately testifies, the arresting court may decide not to issue any additional order: Therefore, if the arrest order is not a final order, it will never be subject to appeal. In either event, the Circuit Court's interpretation of the finality requirement of 28 U.S.C. §158(d) deprives the arrested Debtor of appellate review of the propriety of his arrest.

Unless the Supreme Court grants a writ of certiorari, there may be no other opportunity for the Court of Appeals to correct the District Court's error in ordering the arrest of Mr. Younger. Therefore, the Petitioner respectfully requests that a writ of certiorari be

granted so that this Court may direct the Eleventh Circuit Court of Appeals to consider the merits of Petitioner's appeal.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8628

HAROLD F. YOUNGER
Petitioner

v.

DONNA E. YOUNGER
Respondent

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8628

D.C. Docket No. MC-492-37

IN RE: HAROLD F. YOUNGER,

Debtor.

DONNA E. YOUNGER,

Petitioner-Appellee,

versus

HAROLD F. YOUNGER,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Georgia

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(October 14, 1992)

Before TJOFLAT, Chief Judge, Fay, and Cox, Circuit Judges.

PER CURIAM:

The order challenged in this appeal is a nonappealable interlocutory order. Accordingly, we lack jurisdiction to entertain this appeal, and it is DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE: HAROLD F. YOUNGER,)
)
Debtor.)
)
Bankruptcy #92-40607)

MISC. CASE NO. 492-037

ORDER

The United States Marshal for this District or any district in which the Debtor Harold F. Younger may be found is hereby directed to bring the Debtor, Harold F. Younger before the Court without unnecessary delay. If the said Debtor is found in a District other than the Southern District of Georgia, the Marshall is directed to take into custody and remove him to this Court. If custody is taken at a place less than 100 miles from this Court, the Debtor, Harold F. Younger shall be brought forthwith before this Court, and if taken at a place 100 miles or more from

this Court, the Debtor shall be brought without unnecessary delay before the nearest United States Magistrate, United States Bankruptcy Judge, or District Court Judge for a hearing as provided for in Bankruptcy Rule 2005 B2.

SO ORDERED this 16th day of June, 1992.

/s/John G. Nangle

Judge, United States District Court Southern District of Georgia

28 U.S.C.S §1334(c)

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 [11 USCS §§ 101 et seq.]

28 U.S.C. §158(d)

The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees

entered under subsections (a) and (b) of this section.

11 U.S.C. §101(13)

"debtor" means person or municipality concerning which a case under this title has been commenced;

BANKRUPTCY RULES RULE 2004

RULE 2004. EXAMINATION

(a) **EXAMINATION ON MOTION.** On motion of any party in interest, the court may order the examination of any entity.

(b) **SCOPE OF EXAMINATION.** The examination of an entity under this rule or of the debtor under §343 of the Code may relate only to the acts, conduct or property or to the liabilities and financial conditions of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a

family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor; and any other matter relevant to the case or to the formulation of a plan.

(c) **COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTARY EVIDENCE.**

The attendance of an entity for examination and the production of documentary evidence may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial.

(d) **TIME AND PLACE OF EXAMINATION OF DEBTOR.**

The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(e) **MILEAGE.**

An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the

time the debtor is required to appear for the examination, whichever is the lesser.

BANKRUPTCY RULES RULE 2005

RULE 2005. APPREHENSION AND REMOVAL OF DEBTOR TO COMPEL ATTENDANCE FOR EXAMINATION.

(a) **ORDER TO COMPEL ATTENDANCE FOR EXAMINATION.** On motion of any party in interest supported by an affidavit alleging (1) that the examination of debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor's residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend or examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served, the court may issue to the marshal,

or some other officer authorized by law, an order directing the officer to bring the debtor before the court without unnecessary delay. If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith. If necessary, the court shall fix conditions for further examination and for the debtor's obedience to all orders made in reference thereto.

(b) **REMOVAL.** Whenever any order to bring the debtor before the court is issued under this rule and the debtor is found in a district other than that of the court issuing the order, the debtor may be taken into custody under the order and removed in accordance with the following rules;

(1) If taken at a place less than 100 miles from the place of the order, the debtor shall be brought forthwith before the court that issued the order.

(2) If taken at a place 100 miles or more from the place of issue of the order, the debtor shall be brought without unnecessary delay before the nearest United States magistrate, bankruptcy judge, or district judge. If, after hearing, the magistrate, bankruptcy judge, or district judge finds that an order has issued under this rule and that the person in custody is the debtor, or if the person in custody waives a hearing, the magistrate, bankruptcy judge, or district judge shall issue an order of removal and the person in custody shall be released on conditions assuring prompt appearance before the court which issued the order to compel the attendance.

(c) **CONDITIONS OF RELEASE.** In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of title 18, U.S.C. §3146(a) and (b).